UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

- -x

In the Matter of:

DELPHI CORPORATION,

Debtor.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

February 14, 2007

10:09 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

MOTION to Reconsider FRCP 60 or FRBP 3008 re: Order signed on 12/19/2006 (1) disallowing and expunging certain (A) claims with insufficient documentation and (B) claims unsubstantiated by Debtors' book and records, (II) modifying certain claims, and (III) adjourning hearing on certain contingent and unliquidated claims identified in third omnibus claims objection (related document(s)[6224]) filed by Megan E. Clark on behalf of Carl Allison.

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Transcribed By: Sharona Shapiro

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P R O C E E D I N G S

THE COURT: All right. Delphi Corporation.

MR. LYONS: Good morning, Your Honor.

THE COURT: Good morning.

MR. LYONS: John Lyons on behalf of the debtors and also with me here in court today we have Mr. Dean Unruh who is the Delphi claims administrator, Ms. Karen Kraft who's the managing and structuring counsel. Also Tom Matz, Joe Wharton and Lisa Diaz at Skadden who are also on the Delphi claims team.

THE COURT: Okay.

MR. LYONS: And, Your Honor, as I have done in the previous claims hearings, I'd like to hand up a chart which kind of shows the status of where we are with the various omnibus objections and the remaining amounts that are in the process.

THE COURT: Okay.

MR. LYONS: As you can see, Your Honor, we're making headway. As of today, we have expunged or withdrawn approximately 8.1 billion in claims and we have another several hundred million that are in the process, that are subject to the procedures, that the company is in the process of either reconciling with the claimant or we've actually affirmatively noticed them for adjourned hearings pursuant to the claims procedure order. If Your Honor has any questions, or I can

proceed to the agenda.

THE COURT: No, let's proceed to the agenda.

MR. LYONS: Okay. First, Your Honor, we have a number of matters that were noticed for adjourned hearings pursuant to the claims procedures that we have subsequently, in agreement with the claimant, agreed to adjourn the hearings either to pursue settlement or to give parties extra time to conduct necessary discovery or mediation, as the case may be. The first item on the agenda is the claim filed by Light Source and that has been adjourned to a date yet to be determined. That's item 1 on the agenda. Item 2 is a claim filed by Labor Source 2000, Inc. and that has been adjourned to March 1st. Your Honor, by agreement of the parties, we are going to be submitting that on the papers and there will not be any live testimony. Counsel will be able to argue on the papers. So that will be heard March 1st.

THE COURT: Okay.

MR. LYONS: Item number 3 is the claim -- actually, they're related claims -- items 3, 4 and 5 are claims filed by H.E. Services, Mr. Robert Backi and Richard James. Those claims have been further adjourned to April 27th.

THE COURT: Okay.

MR. LYONS: And then finally, Your Honor, a claim of DBM Technologies. That claim's been adjourned to March 1st. It's on the verge of settlement. The parties were looking at

DBM's setoff claim under the setoff procedures under the DIP financing order and we expect that to be resolved shortly.

THE COURT: Okay. Is the Backi -- those three claims, are those in negotiation or are they just subject to --

MR. LYONS: Actually, Your Honor, we have a meet and confer next week at the company -- or in Troy -- which we're going to explore and see what the issues are and there may be a dispositive motion there. I don't know. We're just still in the process of sorting through that claim.

THE COURT: Okay.

MR. LYONS: Item 7 on the agenda -- and these are claims which we're happy to report we've settled. There is not a contested claim today, Your Honor. We've been able to resolve all of the remaining claims. So before I go through these claims, Your Honor, we're operating under the settlement procedures order that Your Honor entered last June to be able to resolve these claims. If the claim is over a certain threshold, a million dollars, then we have to send notice out to the company, the U.S. Trustee, and in certain circumstances, the equity company. So far, with the exception of one claim here, all of them fall under the million dollar limit so we're able to settle those without further notice. We do, however, file a report in consistence with the settlement procedures omnibus, and certainly we have informal discussions with the company and they can ask if they have any questions about any

particular settlement.

THE COURT: Right. Okay.

MR. LYONS: One of the claims, however, is over the threshold. That is the claim of InPlay. We have sent a notice out to the company. The company's requested an additional one-day extension of their objection period and we've given them that extension. So we would expect, Your Honor, that for all these claims we would file with the Court for Your Honor's entry which would be a stipulation compromising and allowing the claim so we can clean up Your Honor's docket. The claims agent then can reflect the claim as allowed in the claims register and then that would put that matter to an end.

THE COURT: Okay.

MR. LYONS: Okay. So the first one, Your Honor, WorldWide Battery. That's item number 7. WorldWide asserted a claim of 2.8 million. We have agreed to settle that claim for 105,000 dollars. The next item, number 8, is Nissan Technical Center. The parties have agreed to settle that claim for 32,734 dollars and 44 cents. Item number 9, InPlay Technologies. InPlay had asserted a claim of 9 million dollars and the parties subsequently agreed to settle for 7.5. That's the claim that the company's still looking at. We expect, though, to be able to hand that stipulation up to Your Honor. The next item, number 10, is a claim held by Longacre Master Fund, which is the assignee of Intervoice, who is the original

creditor with Delphi. That had an asserted claim of 600,000 and we've agreed to settle it for 250,000. Item number 11 is the claim of Ericka S. Parker who is a trustee, actually. We've agreed to settle her claim for 50,000 dollars and that is also being approved simultaneously in, I believe, the bankruptcy court for the New Orleans District of Ohio.

THE COURT: Um-hum.

MR. LYONS: Item number 12 is the claim of Comptrol. Comptrol asserted a claim for 157,801 dollars. We settled for 107,000 dollars and change, so that will be submitted to Your Honor. And, Your Honor, I'd like to hand up the stipulation for Parker so you can see the form of the stipulation. We anticipate -- we're in the process of getting signatures for the settlement agreements which would underpin the stipulations. All these claims are settled. It's a matter of just getting the signatures. But I'd like to hand up to Your Honor the form of the stipulation for Parker, if Your Honor has any questions, because all of these stipulations would be in this form.

THE COURT: And, I'm sorry, there's a separate settlement agreement and a stipulation? Is that --

MR. LYONS: Correct.

THE COURT: -- the documentation that you're using?

MR. LYONS: Yes. And the settlement agreement will have a broader release and additional provisions. The

stipulation that we ask Your Honor to sign would basically say that the claim is allowed in the amount of X -- if I could hand this up, Your Honor, and you'll look at it.

THE COURT: Okay. Thanks.

MR. LYONS: Again, the stipulation would allow the claimant a certain amount and classify the claim as a general unsecured nonpriority claim. The claimant would agree not to assert any additional amounts. And the settlement agreement itself would have a broader release. So it would address all matters prior to the petition date. It does not address administrative claims but would address pre-petition claims.

THE COURT: Okay. Well, let me just take a look at it. I guess I have one comment which is that it is couched as a joint stipulation --

MR. LYONS: Yes.

THE COURT: -- and includes an express waiver by the claimant of any other claims other than the allowed amount. But it's not executed by either party.

MR. LYONS: We intend to have the parties --

THE COURT: Signature lines?

MR. LYONS: -- sign.

THE COURT: Okay.

MR. LYONS: Both the parties will sign the stipulation.

THE COURT: And you may want to have it be a joint

stipulation and order too.

MR. LYONS: Okay.

THE COURT: I mean, I don't care. Some people like to see that in the title. I don't mind. I'm happy to have a so ordered line too, if you want.

MR. LYONS: Okay. Excellent. We will add order to it.

THE COURT: Well, you don't have to. But if people want that, I don't mind having that.

MR. LYONS: Okay. Very good. Okay. Next on the agenda, item number 13, Your Honor. We have a pending objection, the third omnibus objection to the Cadence claims. As Your Honor may recall, Your Honor lifted the stay once mediation is completed in Cadence so they could liquidate their claim in the district court. We still have our pending third omnibus objection, so I spoke with Mr. Connelly and we have an agreed form of stipulation, which we'll submit to Your Honor after the hearing, which basically suspends the prosecution of our third omnibus objection with respect to Cadence's claim and it adjourns, you know, the hearing. We would have --

THE COURT: Until completion of the liquidation process?

MR. LYONS: Yes. And all likely, Your Honor, that process will extend beyond emergence. But in any event, if one of us wants to renotice it for some reason, we can to the other

party.

THE COURT: Okay.

MR. LYONS: And we will submit that signed stipulation to Your Honor after the hearing.

THE COURT: Okay.

MR. LYONS: Item number 14 on the agenda. This is a continued matter from the fourth omnibus claims hearing. We have several local union claims that we're filing against all forty-two debtor entities. We have agreed on a form of a stipulation that has the similar language that Your Honor's already approved with respect to other duplicate claims, that if the claim ultimately should reside in the entity of -- for the claim that's been expunged, they could switch over or switch back upon notice, basically. It doesn't prejudice their rights.

But we are going to expunge the forty-one claims and have one single surviving parent claim to just clean up the docket. And again, this would apply to a number of local unions including the IUECWA, the IAM, the IBEW, and the IUOE. We're in the process of getting signatures on the stipulations, so we would submit it to Your Honor after the hearing.

THE COURT: Let me make sure I understand, then. There will be a claim deemed filed against the parent by each of these entities?

MR. LYONS: Delphi Corporation, yes, it would.

THE COURT: And the stipulation will provide, however, that with regard to other debtors, the union's rights are reserved --

MR. LYONS: Correct.

THE COURT: -- to have a claim against another debtor?

MR. LYONS: Yes, if it would turn out that that claim actually resided against Delphi Automotive Systems LLC.

THE COURT: And how is that ultimately going to be determined?

MR. LYONS: Well, ultimately Your Honor would determine that if the claim actually would reside against Delphi Automotive Systems LLC.

THE COURT: Well, I guess I'm putting this a different way. What is the procedural vehicle for determining that?

MR. LYONS: I would think they would have to file a motion to reclassify their claim against Delphi Automotive Systems LLC. However, under the stipulation, again, it's without prejudice of their ability to do so. They could reassert it against -- and the stipulation --

THE COURT: But the burden's going to be on them to shift it, in essence, from the parent company to another entity?

MR. LYONS: Yes, and it would be a simple notice to

the debtors.

THE COURT: All right.

MR. LYONS: Now, Your Honor would determine if the claim appropriately does or does not reside.

THE COURT: Right.

MR. LYONS: But they, just upon notice to us, could reassert it against another debtor entity.

THE COURT: Now, what about the rights of other creditors? For example, a creditor of the parent may believe that the claim's not properly asserted against the parent but should be really asserted against a sub. Are those preserved?

MR. LYONS: The stipulation does not deal with that. Any creditor party in interest can object to any claim. So if they wanted to file a claim objection --

THE COURT: They can still object?

MR. LYONS: They can still certainly object.

THE COURT: Okay. All right.

MR. LYONS: Okay, Your Honor, I think that takes us to the two motions to reconsider. And again, I would relinquish the podium to the two movants.

THE COURT: Okay. So we're going to take the claim by Mr. Nguyen first?

MR. DARST: Yes, thank you. Your Honor, this is Richard Darst, attorney for Mr. Nguyen. Am I supposed to speak now?

THE COURT: Yes.

MR. DARST: Thank you very much. The claim of Mr. Nguyen, which he has Americanized to Win so that people can understand his name, the pronunciation is Win. He has timely filed his claim and there is no dispute as to that. And he has properly supported his claim. In fact, he has submitted such affidavits with documentary evidence attached including the Indian Civil Rights Commission claiming that he was harassed because of his national origin. And I do not believe there is any dispute to the fact that the claim was properly supported. The debtors argue that Mr. Win did not respond to a notice relating to the third omnibus notice. The debtor -- it has followed the literal instructions of the third omnibus notice. And the third omnibus notice stated that attached to the notice was Exhibit A, which was a form and that a personalized notice will be sent out, meaning later, after that. And we did not receive any notice after that. I believe it is, in retrospect, the debtor's position that this attachment, which was identified in the third omnibus notice as a form, was actually what they are now claiming was the personalized notice. We did follow the instructions of the third omnibus notice, literally follow it. And so we believe that we have done the proper thing. The third omnibus notice made reference to a general claim that -- or a general objection that claims were unsupported. This is not the case with Mr. Win. I don't

believe there's any dispute that Mr. Win's claim was supported by such affidavits plus documentary evidence.

The matters as submitted -- well, I will, first of all I will give Your Honor the sequence of events. What we then received, after saying that we would get a personalized notice, instead of getting a personalized notice we were sent a personalized order denying our claim. And I immediately called Mr. Butler, the attorney for the debtors, and was unable to reach him by cell phone so I left a cell phone message with him. I did not receive any telephone call from him. On the same day that I telephoned him, I sent him a letter. And I did not receive any letter response from him. Nor did I receive any letter response from any other attorney at Skadden Arps. I called a couple more times and did finally receive telephone messages from one of the attorneys at Skadden Arps by the name of Lisa Diaz, a very professional nice young lady. But she called a couple times after our office had closed at 5 o'clock. I returned those calls and was unable to get her when I called back. Finally, just -- I believe it was last week, if I remember correctly, we spoke for the very first time and attempted to exchange information and resolve our motion in dispute. And Ms. Diaz requested that I send to her copies of what I had received, which I did. I immediately sent to her, by e-mail, copies of the third omnibus objection which stated in the footnote that attached was Exhibit A, the form; not a

personalized notice. And unfortunately, Ms. Diaz did not have any more information than I had and we were unable to resolve the claim. She said that she would relay that on to they, although they was never identified. I never did hear from Mr. Butler or any other attorney. I did receive from her the following day, or a couple days later, information that they were filing an objection to the motion to reconsider. They did ask if I would consent to a one-day extension of time. I gave them the one-day extension of time. And they did file an objection. The objection attaches to the objection an affidavit of a claims administrator which states that the personalized notice was at the back of the packet of the third omnibus objection. That is different than the instructions that were given to us in the third omnibus notice, particularly in footnote 3 of the third omnibus notice, which says that attached was a form of objection. So the debtors may have intended that the personalized notice be at the back of the packet, but that is not what they said in the third omnibus objection. So they have told the Court an explanation which they did not tell to us. And we did, again, just follow the literal instructions of the third omnibus notice.

In the objection, the debtors have cited a few cases, the most important case is the Supreme Court case of Pioneer Investment Services Company v. Brunswick Associates. And that actually is not in favor of the debtors but rather is in favor

of a creditor claim of Mr. Win such in which the Supreme Court recognized the liberal authority of the Court to construe excusable neglect that included an inadvertent mistake or carelessness. And in our situation, we believe that we were not careless and in fact followed the literal instructions of the order.

The debtors have stated that the fault is entirely on us, the creditor claimant. However, we believe that we've done the proper thing. If we did not do the proper thing, there certainly was blame on the debtors for not making it clear as they did in their recent objection to the Court stating that the personalized notice was actually at the back of the packet, not that a form was at the back of the packet. The Pioneer case said that circumstances can balance such a motion. As a matter of fact, this case involved a late claim, not something that's involved here. We filed our claim timely. But since the debtors have relied on this case in relation to their third omnibus objection, I'll try to go through the elements they object on, the elements that they had mentioned. Number one was the reason for the delay. And the reason for the delay was very good faith on our part. As a matter of fact, we fact attempted to contact Mr. Butler immediately. Mr. Butler did not respond. The lawyer that did respond was very professional in her attitude, but she did not have any more information than I had.

Another element is prejudice to the debtor. There is no prejudice to the debtor. We responded promptly. The debtor's attorneys, in fact, did not respond promptly. Another element is the length of the delay. The length of the delay is very short. We promptly brought this to the attention of the debtor's attorneys and when the debtor's attorneys did not respond we promptly filed a motion to reconsider with the Court.

So all we are asking in this case is that the Court reconsider before denying the claim, which is well supported, and rather just let us end the resolution of claims which the debtor's attorneys have stated that they are still working on.

THE COURT: Well, let me make sure I understand. You received the notice of objection to claim that says James H. -- you pronounced it Win, but it's spelled N-G-U-Y-E-N -- appeal filed and then --

MR. DARST: You are correct, sir.

THE COURT: Sorry?

MR. DARST: You are correct.

THE COURT: I am correct? Okay. And that was in the package with the third omnibus objection?

MR. DARST: It was, and footnote A states a form of notice of objection to claim is attached hereto as Exhibit A. That appears to be what that note said. The one dated outside just says this is a form indicating that -- as a matter of

fact, footnote A or footnote 3 says claimants will receive copies of this third omnibus claims objection without exhibits B1, B2, C1 and C2 and D hereafter. But in any case that A is attached, which is a form, not something that we were to respond to.

THE COURT: Did you read the notice?

MR. DARST: Yes.

THE COURT: Including the language in it about scheduling a hearing and giving a response date?

MR. DARST: Yes.

THE COURT: Okay. What was confusing about that?

MR. DARST: It appeared, well, in fact it did not only appear but it was stated in footnote 3 it should be form, that we would then receive a notice, a personalized notice, which apparently would be signed and dated starting the time to file our objection. And so this form was then filed and we did not receive any personalized notice, which would be after that.

THE COURT: Okay.

MR. LYONS: May I respond, Your Honor?

THE COURT: Well, let me just -- Mr. Darst, has Mr. Win or you filed a notice of appearance in the case, generally?

MR. DARST: I don't believe we did. We filed a proof of claim.

THE COURT: Okay. All right. Okay. Thanks.

MR. LYONS: Your Honor, in response. It's

uncontroverted that Mr. Win's counsel received the package on November 5th. I think he concedes that. And the package, actually, which he confirmed he received, is attached as Exhibit B to our response to his motion, which is actually the package -- you know, again, I don't -- the standard we believe that Your Honor needs to apply here is under Rule 60(b) whether or not there's excusable neglect.

I think, Your Honor, with all due respect to counsel, it was pretty crystal clear that a response had to be filed. And this is both in the personalized notice of objection, which lists Mr. Win expressly, and also in the body of the third omnibus objection as well, in paragraph 50. It says if you don't respond, your claim is subject to being expunged by the Court. Your Honor, this is not going to a pro se claimant who has limited, you know, intellectual abilities. This went to a --

THE COURT: Well, I wouldn't say intellectual, I'd say legal.

MR. LYONS: Legal. I'm sorry, yes.

THE COURT: There's often a distinction.

MR. LYONS: Legal experience. I mean, this went to counsel. Your Honor, any time you would receive an objection in a case, I would think you would be very careful to review the terms of that objection, you know, why are they serving it on my client. And again, the notice of objection, the

personalized notice which Your Honor has approved, is crystal clear when the response deadline is. And there's been no showing of excusable neglect, especially under the Second Circuit's construction in the Midland Cogeneration case, which is a stricter view than some other circuits on exactly what constitutes excusable neglect and the reason for delay. And as to prejudice, Your Honor, there is prejudice here.

We have a number of constituents, including the plan investors who are relying on the integrity of the claims process. And, you know, they see, as we proceed through this, claims that are expunged. If we open the door to let some of these claimants back in, it is creating a tremendous amount of uncertainty, which could affect the prospects for reorganization.

Again, one of the requirements in the framework agreement, Your Honor, is that certain general unsecured claims are less than 1.7 billion dollars. So the constituents in this case are watching, you know, will be watching the integrity of this claims process. And again, with all due respect, we don't think that excusable neglect has been met here. And we'd like to offer into evidence the declaration of Evan Gershbein (phonetic) just as a procedural matter to provide the uncontroverted evidentiary support that this in fact was mailed out.

THE COURT: Okay. Although I believe that the

claimant has acknowledged it received --

MR. LYONS: Yes.

THE COURT: But is there any objection to the admission of the notice agent's affidavit?

MR. DARST: No, Your Honor, there is not. As a matter of fact, that supports our position because he then explained in that declaration that the personalized notice was at the back of the packet, which explanation was not in the third omnibus objection. And rather, the third omnibus objection contradicts that and says this is only a form, you will be receiving personalized notice later.

MR. LYONS: In quick response to that, Your Honor, that footnote is to explain the process the debtors underwent to Your Honor. All these claimants still received the personalized notice. The footnote says that we are sending the personalized notice along with a third omnibus objection.

MR. DARST: No. I'm sorry. It does not say that.

MR. LYONS: Well, let's read it.

MR. DARST: Footnote 3 says a form of the objections to the claim is attached hereto as Exhibit A.

MR. LYONS: Footnote 3. Well, Your Honor, I can actually read it for you.

THE COURT: No, I've read it.

MR. LYONS: It says that they will receive the personalized notice and they will receive a copy of the third

omnibus objection. And that's exactly what we did and that's what they received.

MR. DARST: No. "Will" means you will in the future.

MR. LYONS: Well, the second last line says claimant "will" receive a copy of this third omnibus claims objection without exhibits B1, B2, C1, C2 and D. And, in fact, you did receive that without those exhibits --

MR. DARST: Right. But we --

MR. LYONS: -- on November 5th.

MR. DARST: -- received Exhibit A, which was the form. And that's what footnote 3 says.

THE COURT: I think the point that the debtor's counsel is making is that if you apply a concept of futurity to the word "will," then you would actually also be expecting another third omnibus claim objection as opposed to the one that you were reading. Okay. Anyone else want to address this motion? Okay.

MR. DARST: May I give a short reply, Your Honor?

THE COURT: Sure.

MR. DARST: Thank you. The debtors have stated that the Second Circuit has a stricter view. There can be no stricter view than what's been forwarded to you. And the debtor has attempted to argue in its objection that extraordinary circumstances must be shown. But, in fact, the Supreme Court in Pioneer said extraordinary circumstances under

Rule 60 applies under subsection (6) such as a motion brought after one year.

The debtor's attorney has mentioned -- noted intellectual or legal abilities, and I agree that I probably do not have as much as they do, but we have tried to do everything in good faith to reply, including contacting them. They are the ones who did not respond to my letter in writing, did not respond to my telephone calls until a month later. When they did respond, they knew no more information than I did, although I provided to them all of the information that I had.

So because of that we would show the Court that we have done everything in good faith. The delay is very short. We responded very promptly. There is no prejudice. The debtors have said well, there could be some sort of prejudice, maybe. That is not showing prejudice at all and so we ask that the Court grant the motion and simply place us in the federation of claims.

THE COURT: Okay. I have before me a motion by Mr. Win, through his counsel, Mr. Darst, to reconsider the Court's order of December 19, 2006 granting the debtor's objection to Mr. Win's claim, claim number 3978. The motion does not state the rule under which the relief is sought. And there is some variation in the case law in this circuit as to the proper rule for a motion of this kind. Arguably, and this is the position that the debtors have taken, this type of relief, which is

outside the ten days following entry of the order, is one that is made under Bankruptcy Rule 9024 which incorporates Federal Rule 60(b) for reconsideration of judgments.

Alternatively, some courts have considered, in this circuit, such a motion to be one for reconsideration of the disallowance of a claim that would be made under Section 502(j) of the Bankruptcy Code and Bankruptcy Rule 3008.

For the former proposition that rule 60(b) would apply, see In re O.W. Hubbell & Sons, Inc., 180 B.R. 31 (N.D.N.Y. 1995). For the latter proposition, see In re Enron Inc., 325 B.R. 114 (Bankr. S.D.N.Y. 2005). Enron relies upon, among other cases, In re JWP Information Services, Inc., 231 B.R. 209 (Bankr. S.D.N.Y. 1999) in which the court considered both propositions and found that the motion would be denied under either Rule 60(b) or 502(j) and the standard applied by the Second Circuit in considering a motion to vacate a default judgment. Rule 60(b) includes, as a basis for vacating a default judgment, excusable neglect. Bankruptcy Code section 502(j) refers to the equities of the case.

And in construing that section, Judge Gonzalez in Enron and Judge Gallet in JWP applied the three factors first enunciated by the Second Circuit in American Alliance Insurance Company v. Eagle Insurance Company,92 F.3d 57 (2d Cir. 1996). The distinction is relevant possibly only in this sense. As the District Court for the Northern District of New York held

in In re O.W. Hubbell & Sons, Inc., 180 B.R. at 31, one may apply the U.S. Supreme Court's Pioneer decision in determining such a motion, and that decision, as interpreted by the Second Circuit, is one where the Second Circuit has taken a "hard line" when applying the Pioneer factors.

Specifically, the Second Circuit has held that of the four factors, one, the third factor, is the most important. That is, the factor of the reason for the delay, including whether it was within the reasonable control of the movant, is the most important factor.

As the Second Circuit has held, in construing Pioneer, the equities will rarely, if ever, favor a party who fails to follow the clear dictates of a court rule. (That's also been construed to apply to a court order.) And that where the rule is entirely clear, the Second Circuit continues to expect that a party claiming excusable neglect will, in the ordinary course, lose under the Pioneer test. See Midland Cogeneration Venture L.P. v. Enron Corp., 419. F.3d 115, 122 (2d Cir. 2005), which cites, for the preceding quotes, Silivanch v. Celebrity Cruises Inc. 333 F.3d 355, 368 (2d Cir. 2003), cert. denied sub nom. Essef Corp. v. Silivanch, 540 U.S. 1105 (2004).

Under that test, given the acknowledgement by the claimant, through his counsel, that the notice was received and received timely, and my view that the notice was entirely

clear -- and I'll return to that in a moment -- the motion would fail under the Pioneer test as construed by the Second Circuit.

However, as I noted, the Enron and JWP cases, as well as other cases relied upon by the Enron decision that I cited earlier, do not apply Pioneer specifically in construing the phrase excusable neglect in Rule 60(b), but rather apply a somewhat different standard, the one enunciated in American Alliance Insurance Company v. Eagle Insurance Company, 92 F.3d 57.

The standard set forth in that case involves an evaluation of three factors, unlike the four-factor analysis in Pioneer, with Pioneer's emphasis on the third factor. The three-factor test is whether the failure to respond was willful, whether the movant had a legally supportable defense on the merits, and the amount of prejudice that the nonmovant would incur if the court granted the motion.

As Judge Gonzalez found in Enron, 325 B.R. at 118, the Second Circuit has interpreted the willfulness factor to require something more than just negligence or carelessness on the part of the movant. Defaults that are caused by negligence may be excusable, depending on evaluation of the other factors, while defaults that occur as a result of deliberate conduct are not excusable. As made clear by the Second Circuit in Gucci America, Inc. v. Gold Center Jewelry, 158 F.3d 631, 635 (2d.

Cir. 1998), willfulness does not require bad faith or wrongful conduct. Rather, the focus is on what the movant actually knew, so that if a default did not involve any cognitive decision to allow a hearing on its claim to proceed and permit a default to be entered, then the movant did not act willfully for purposes of this construction.

And under some circumstances, that distinction from the Second Circuit's interpretation of Pioneer might be meaningful. For example, it would be meaningful if the movant were a pro se litigant or if the notice were confusing. For example, in a second case out of the Enron Chapter 11 case, In re Enron Corp., 326 B.R. 46 (Bankr. S.D.N.Y. 2005), the notice was misleading to the claimant in that they reasonably checked "University of Pennsylvania" and "Pennsylvania" in the exhibit to the notice, but not "Trustees of the University of Pennsylvania," and, therefore, did not willfully fail to respond.

Here, however, Mr. Win was represented by counsel who received the notice, and the Second Circuit has long recognized this distinction in such situations. See Teltronics Services, Inc. v. L M Ericsson Telecommunications, Inc., 642 F.2d 31, 36 (2d Cir. 1981) (refusing to relieve a client of the burdens of a final judgment due to the mistake or omission by an attorney). Moreover, notwithstanding counsel's argument, I do not believe that the notice received by the claimant was

confusing or ambiguous. It clearly was a personalized notice, headed “notice of objection to claim,” followed by the claimant's name and then setting forth in the first paragraph in uppercase print the deadline to respond and the statement that “if you do not respond timely in the manner described below, the order granting the relief requested may be entered without any further notice to you.”

It's argued that a footnote to the omnibus claim objection that was included in the package along with the notice that I've just quoted, which is footnote 3, was confusing in that it referred to a form of notice of objection to claim that would be attached thereto, and a reference to the fact that consistent with the notice provided to claimants with respect to the first omnibus claim objection and approved by the Court and the order entered with respect thereto, the debtors “will provide each claimant whose proof of claim is subject to an objection pursuant to this third omnibus claim objection, with a personalized notice of objection to claim which specifically identifies the claimant's proof of claim that is subject to an objection and the basis for such objection,” which Mr. Win's counsel argues led one to believe that there would be some form of future notice to be received, as opposed to the actual notice that was contained in the package that I quoted from earlier.

I do not believe that this is a reasonable

interpretation by a lawyer. Arguably, it would not be reasonable by a businessman either, particularly in light of the language that I quoted from the first paragraph of the notice identifying Mr. Win and his claim and stating that "the deadline for you to respond to the debtor's objection to your claim is 4 PM Eastern Time, November 24, 2006." And stating that "if a response is not timely made, as described below, the order granting relief requested may be entered without any further notice."

So under these circumstances, I conclude that the failure to respond was deliberate and conscious. Under the Gucci case I believe that is all that is required in respect of evaluating the motion. However, I will note that while the amount of the claim itself is not necessarily so high that it would jeopardize the debtors' bankruptcy if the debtors had to focus on it now, there is prejudice to the debtors in not holding claimants to the procedures that have been adopted in this case and that are set forth in the third omnibus claim objection, among all the other claim objections filed in the case, for the response, the timely response, to claim objections.

The debtors, on notice to parties in interest, adopted procedures for dealing with the thousands of claims and billions of dollars of claims filed against them. In a manner to deal with such claims efficiently and fairly, the claim

objection itself is the starting point for that process which follows thereafter through various stages which are outlined in the claim objection itself, including hearings on dispositive motions, if appropriate, discovery, mediation, all preceded by a meet and confer session.

That process, as a whole, is somewhat lengthy, and a delay of it, whether within the reasonable control of the claimant under the Pioneer standard or on a deliberate basis under the American Alliance standard, throws that process out of whack. So although that consideration is not dispositive in connection with this motion, it is an additional factor that I've considered in addition to my belief that under either the Pioneer standard or the American Alliance standard the claimant has shown neither excusable neglect nor an equitable basis for having the order be reconsidered. So Delphi can submit an order denying the motion on that basis.

MR. LYONS: We will, Your Honor. The last item on the agenda, Your Honor, is the motion to reconsider of Mr. Allison.

THE COURT: Okay. Ms. Clark, are you on the phone?

MS. CLARK: Yes.

THE COURT: Okay.

MS. CLARK: Yes. May I be heard?

THE COURT: Yes.

MS. CLARK: I want to note I've been listening for

the last fifty minutes or so, and I had had some intermittent instances where the connection was cut out for a minute or two.

THE COURT: Okay. Well, I apologize about that. We'll all try to speak more into the microphone.

MS. CLARK: Okay. And so that the record is clear, I would just like you to know that if there's some need for me to repeat something I've said, of course I'd be happy to do so.

THE COURT: Okay. Feel free to interrupt too if you can't hear us.

MS. CLARK: Okay. Thank you. The motion to reconsider here, Your Honor, concerns Carl Allison, who was one of the creditors when they had bankruptcy. And there are some themes that are similar to the motion you just published which you just ruled. In this case, the facts are a little bit different but we would set the Court to the three-part test enunciated in the American Alliance v. Eagle Insurance Company reference to which was just made in the last motion. The problem here was Mr. Allison -- there was an objection raised to Mr. Allison's claim on the third omnibus objection and there was the deadline. 1/24, I believe it was, to respond. Mr. Allison received the notice twenty-one days before the response deadline, which is less than the thirty days to which I believe he's entitled. But, however, it is true to say that he did not respond within the time frame.

I think that this is a situation where bankruptcy can

be a trap for the unwary because our office did receive a notice from Delphi, again, within twenty-one days before the response deadline. And it was not -- we failed to respond in time, not because of any willful management techniques but because of simple mistakes. As soon as we received the notice regarding the expungement of the claim we immediately took action to fix this problem. We in no way were willful or consciously refusing any response deadline. We certainly wouldn't have done that as his counsel. Referring to the three-part test, again, as referenced before, American Alliance v. Eagle Insurance Company, failure to respond, the first part of the test, failure to respond being willful, that is not the case here. It was at most, or at worst, neglect. We are not a bankruptcy firm. We missed the contours of your order here. The second part of the test legally supportable defense, as we noted in our motion to the Court, the basic thrust to the objection to Mr. Allison's claim was that it was unsubstantiated. We think that this objection was weak or unsupported. Mr. Allison has an age discrimination claim against Delphi. He had filed -- per the bankruptcy he had filed a complaint and supporting documentation regarding that claim. The (indiscernible) discovery when the bankruptcy was filed (indiscernible). And there was no more substantiation that we could have provided the Court than what we did in this proof of claim, the basic documentation of the complaint that

we had filed. And the complaints often do give a basic (indiscernible) is the best we can offer at this stage in the case.

Finally, referring back to the three-part test, the question of prejudice. We think the balance of the equities here squarely favors Mr. Allison while we do recognize and understand that this is a big case and that Delphi has to, you know, due to schedules and calendars and so forth, to keep things moving.

We do think that the prejudice to Mr. Allison -- well, first of all, all I'm talking about here is a very short delay. And we really believe that there's no harm there found to Delphi in the sense that simply opening up one more claim isn't going to have much of an effect on the overall case which is in February or March. But on the other hand, we feel that denying the motion will cause great prejudice to Mr. Allison because this is his one and only case against Delphi, and if the motion is denied he may not be able to pursue it at all. I think, you know, I've heard nothing from Delphi indicating why a very short -- a very short amount of time that passed here between the rejection deadline and our motion is going to materially affect them in any way. And so for these reasons we submit the motion to reconsider and I would reserve our right to reply if I may, sir.

THE COURT: Okay. Yes.

MS. CLARK: Okay. I just --

THE COURT: No, I think counsel for the debtor was just about to speak.

MR. LYONS: Yes, Your Honor.

THE COURT: That's why I was pausing.

MS. CLARK: Okay.

MR. LYONS: Your Honor, if I may respond. I believe the facts here are very similar to that of Mr. Win. Counsel again admits that she received the package on November 9th, which is before the hearing. Bankruptcy Rule 3007 requires the debtors to mail the claim objection thirty days prior to the hearing.

And, Your Honor, I would like to submit into the record and into evidence the declaration of Mr. Evan Gershbein, which we attached to our response to Mr. Allison's motion, which confirms that indeed this was mailed on October 31st. He filed an affidavit the next day confirming service and subsequently filed this declaration to reconfirm. So, Your Honor, I believe we're in full compliance with Bankruptcy Rule 3007.

THE COURT: Okay. Is there any objection to the admission of that declaration?

MS. CLARK: No, sir.

THE COURT: Okay.

MR. LYONS: All right. Your Honor, why it wasn't

received until November 9th, Your Honor frankly, I don't know. It could have been the post office. It could have been perhaps a clerk in counsel's office that may have misplaced it. But again, Bankruptcy Rule 3007 requires the debtor to mail it within thirty days of the hearing and the declaration so proves that point.

As to the other points of Mr. Allison's counsel, Your Honor, there is prejudice. I'm not going to rehash the arguments. They really are the same arguments in response to Mr. Win's motion. But again, we are in a very expedited claims process. We are trying to emerge from bankruptcy at the earliest possible time. We have a framework agreement in place that requires general unsecured claims, certain general unsecured claims, to be less than 1.7 billion dollars. And the integrity of Your Honor's orders and orders expunging claims under omnibus claims are very crucial to this task.

THE COURT: Okay. Ms. Clark, did you want to respond?

MS. CLARK: Excuse me for coughing. Yes, sir, just a couple quick points. The policy when we receive documents, in my office, we stamp them with a date received stamp. The date received stamp here in this case was November 9th. So it was not received until the 9th about, approximately nine days after it was apparently mailed. And we're not sure. We don't understand the reason why that would have happened. In any

event, nine days or no nine days, while it's true that the notice was received before the deadline, there was no willfulness on our part. It was not realizing that we had to make an objection. Had we known that, we would have obviously objected.

THE COURT: Well, why was it not realized?

MS. CLARK: I don't have the answer for that. We just didn't realize that we had to object.

THE COURT: Okay.

MR. LYONS: Your Honor, one quick question I have. Did counsel move offices?

MS. CLARK: Yes, we did, in August.

MR. LYONS: Did counsel ever change the address in the proof of claim form between the time that you moved offices?

MS. CLARK: I don't know the answer to that.

MR. LYONS: Your Honor, that --

MS. CLARK: I'd have to check.

MR. LYONS: -- I think that explains the November 9th.

MS. CLARK: That's possible.

THE COURT: Okay.

MS. CLARK: And we did indicate, in our motion, that there had been a change in law firms that we changed offices. I don't know if that's significant or not.

THE COURT: Right. Okay. All right. Anything else?

MS. CLARK: That's about it.

THE COURT: All right. I have in front of me a motion by Carl Allison, through his counsel, who seeks reconsideration of an order granting the debtors' objection to his proof of claim in this case. The motion is made pursuant to Bankruptcy Rule 3008, which is an implementing rule for motions under Bankruptcy Code Section 502(j) for reconsideration of an order allowing or disallowing, in this case, a claim.

As I noted with respect to the previous motion to reconsider, the basis for such a motion, that is, the statutory basis for such a motion, is not entirely clear in this circuit. It may well be that the proper basis is under Bankruptcy Rule 3008 and Bankruptcy Code 502(j) as discussed in, among other cases, In re. Enron Inc., 325 B.R. 114 (Bankr. S.D.N.Y. 2005), which applies to the analysis under 502(j) the standard for the consideration of a request for relief from a default judgment. Under Rule 60(b), as enunciated by the Second Circuit in American Alliance Insurance Company vs. Eagle Insurance Company, 92 F.3d 57 (2d Cir. 1996).

Alternatively, one might, in considering relief under Section 502(j) and Rule 3008, apply the standard enunciated by the Supreme Court in Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 113 S. Ct. 1489

(1993), and memorialized in Rule 9006, in determining the phrase “excusable neglect” that appears in Federal Rule 60(b) as incorporated by Bankruptcy Rule 9024.

As I noted before, whether one applies the Pioneer standard as did the district court in In re O.W. Hubbell & Sons, Inc., 180 B.R. 31 (N.D.N.Y. 1995), or the American Alliance Insurance Company standard that Judge Gonzalez applied in Enron, may in some circumstances be a meaningful distinction, although at times, as in the case of In re JWP Information Services Inc., 231 B.R. 209 (Bankr S.D.N.Y. 1999), the facts are such that application of either standard would reach the same result.

Although, as Judge Gonzalez stated in Enron, there's a strong preference that courts resolve disputes on their merits,see, e.g., Brien v. Kullman Indus., Inc., 71 F.3d 1073, 1077 (2d Cir. 1995), the Second Circuit has recognized limitations on that basic premise in applying both the Pioneer and the American Alliance Insurance tests.

As the Second Circuit has construed Pioneer, it has taken a "hard line" when applying Pioneer's four factors. More specifically, the court has emphasized the third factor, that is, the reason for the delay including whether it was within the reasonable control of the movant, as the Second Circuit noted further in Midland Cogeneration Venture L.P. v. Enron Corp., 419. F.3d 115, 122 (2d Cir. 2005), the equities will

rarely, if ever, favor a party who fails to follow the clear dictates of a court rule (that is also then applied to orders), and that where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the Pioneer test.

Under that standard, based on my review of the agreed facts here, I conclude that the movant would lose under the Pioneer standard. The notice was acknowledged to have been received on a date twenty-one days before the hearing date, and the affidavit of service establishes that it was mailed within the thirty-day period prescribed by Bankruptcy Rule 3007 with respect to claim objections.

The district court in In re O.W. Hubbell & Sons, Inc., makes it clear that a presumption of receipt on a timely basis may be established by showing a proper mailing. And the case law makes clear that affidavits of employees denying receipt are not sufficient to rebut the presumption. Here, there's no affidavit denying receipt, only one saying that receipt was outside of the thirty days. But that does not rebut the presumption that the notice was timely sent as set forth in O.W. Hubbell & Sons, Inc., 180 B.R. at 34.

Moreover, there's been no attempt to excuse a failure to respond to the notice in any way either by filing an objection or by seeking an extension of time to do so. And, in fact, the receipt of the notice, arguably for purposes of this

ruling, twenty-one days before the hearing would not justify taking no action in response to the notice which was clear on its face in setting forth an objection deadline and warning in uppercase text in the first paragraph the adverse consequences of not making such an objection.

Under the three-part test set forth in American Alliance, there is a somewhat different analysis than under Pioneer. Pursuant to that test the Court should consider one, whether the failure to respond was willful, two, whether the movant had a legally supportable defense, and three, the amount of prejudice that the nonmovant would incur if the Court granted the motion.

As Judge Gonzales articulated in Enron, 325 B.R. at 118, the Second Circuit has interpreted the willfulness factor to require something more than just negligence or carelessness on the part of the movant, although gross negligence can weigh against a party seeking relief, although not necessarily a determinative factor. Deliberateness, however, not necessarily with bad faith, but simply cognitive deliberate failure to avoid a default is dispositive, as set forth in Gucci America, Inc. v. Gold Center Jewelry, 158 F.3d 631, 635 (2d Cir. 1998). Here, I conclude that Mr. Allison, through his counsel,unlike the claimant in the Enron case, did know of the objection and made a cognitive decision not to respond and consequently the motion would be precluded under the American Alliance Insurance

test as well. I note that especially because, again, Mr. Allison was represented by counsel and the notice was clear and the only excuse really given for not responding was a belief that the notice was not timely, i.e., outside of the thirty-day period prescribed by Bankruptcy Rule 3007.

As with the prior motion, I also believe that here there would be prejudice to the debtor in permitting the claim to be reconsidered. In fact, I believe that there's more prejudice here given the length of time between the receipt of notice, which again was understood here, I believe, and in that the only excuse for not responding was a belief that the notice was untimely, and the date of the motion to reconsider which was over two months later. While that is obviously less than the ten months in the JWP case, here, as I noted before, the debtors on notice to parties in interest obtained approval of procedures for dealing with thousands of claims and billions of dollars of claims against them which runs off of a starting line which is the claim objection. The procedure contemplates responses on a timely basis to be followed by meet and confer sessions, either dispositive motions or discovery and/or mediation, which is intended to result in the efficient liquidation of claims. But to do so in an organized way provides for a fairly lengthy process. A two-month delay in that process, when from the start, if justified on these facts, is one that other claimants could use as well to throw off the

process in a way that really would prejudice the debtors who are under considerable pressure to emerge from bankruptcy before this fall.

So although that is not a dispositive reason, it's another factor that I've considered in weighing either the request under 502(j), which is on the equities, or under Rule 60(b), which may or may not incorporate Pioneer. But in any event does incorporate, at a minimum, a notion of deliberateness, which I believe occurred here. So for those reasons, I'll deny the motion, and counsel for the debtors should submit an order to that effect.

MR. LYONS: We will, Your Honor.

THE COURT: As I often do when I give an oral decision, I'll go over the transcript of both of these rulings and may end up correcting it, in which case that will be my bench ruling. But the gist of the rulings won't change.

MR. LYONS: Thank you, Your Honor.

THE COURT: Okay.

MR. LYONS: Those are all the items we have on the agenda. There is one item, Your Honor, that's not on the agenda. Mr. LaFonza Earl Washington has filed various pleadings with the court. He stated that no hearing is required. The debtors would inquire whether Your Honor would like to treat that at a hearing, or possibly dispose of it in an administrative manner. We're ready to do --

THE COURT: Well, I'm not aware of the pleadings. Were these filed after his claim was disallowed?

MR. LYONS: Yes. It technically wasn't a motion to reconsider, though. It was more along the same lines of a motion for demand for a judgment and payment of his judgment requests. So again, the claims were --

THE COURT: Well, I'll look at the -- I mean, if it's a motion to reconsider I have the discretion to rule without requiring a hearing and I may do that.

MR. LYONS: Thank you, Your Honor.

THE COURT: But I'll look at them and my chambers will be in touch with the debtors and Mr. Washington about whether there will be a hearing or not.

MR. LYONS: Thank you.

THE COURT: Okay. Thank you.

(Proceedings concluded at 11:32 AM)

I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, except where, as indicated, the Court has modified its bench ruling.

Sharona Shapiro
Digitally signed by Sharona Shapiro
DN: cn=Sharona Shapiro, c=US
Reason: I am the author of this document
Date: 2007.03.20 15:38:52 -04'00'

Signature of Transcriber **February 16, 2006**
Date

Sharona Shapiro

typed or printed name

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